

NOTICES OF PROPOSED RULEMAKING

Unless exempted by A.R.S. § 41-1995, each agency shall begin the rulemaking process by 1st filing a Notice of Proposed Rulemaking, containing the preamble and the full text of the rules, with the Secretary of State's Office. The Secretary of State shall publish the notice along with the Preamble and the full text in the next available issue of the Arizona Administrative Register.

Under the Administrative Procedure Act (A.R.S. § 41-1001 *et seq.*), an agency must allow at least 30 days to elapse after the publication of the Notice of Proposed Rulemaking in the *Register* before beginning any proceedings for adoption, amendment, or repeal of any rule. A.R.S. §§ 41-1013 and 41-1022.

NOTICE OF PROPOSED RULEMAKING

TITLE 18. ENVIRONMENTAL QUALITY

CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY REMEDIAL ACTION

PREAMBLE

1. Sections Affected:
Article 3
R18-7-301
- Rulemaking Action
New Article
New Section
2. The specific authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):
Authorizing statutes: A.R.S. §§ 41-1003 and 49-104
Implementing statutes: A.R.S. §§ 49-282(A)(15) and 49-285.01
3. The name and address of agency personnel with whom persons may communicate regarding the rule:
Name: Katheryn A. Cross
Address: Department of Environmental Quality
3033 North Central Avenue, Eighth Floor
Phoenix, Arizona 85012-2809
Telephone: (602) 207-2222 or (800) 234-5677, ext. 2222 (Arizona only)
Fax: (602) 207-2251
4. An explanation of the rule, including the agency's reasons for initiating the rule:
A.R.S. § 49-285.01 mandates that the Department charge a reasonable fee for the preparation and execution of a prospective purchaser agreement. The proposed rule sets forth fees associated with a prospective purchaser agreement.

A. Background for these proposed rules

In passing A.R.S. § 49-285.01, the Arizona Legislature has joined a growing number of states in seeking creative approaches to expedite the redevelopment of former industrial sites. In many cases, the threat of environmental liability and uncertainty associated with environmental contamination has discouraged redevelopment of these former industrial sites. A.R.S. § 49-285.01 allows the Department to enter into a prospective purchaser agreement which provides a written release and covenant not to sue for any potential Water Quality Assurance Revolving Fund ("WQARF") liability for existing contamination if certain statutory conditions are met. Although the statute also refers to providing immunity from contribution claims, the Department has been advised by legal counsel that such immunity can only be provided through a court decree, since the Department lacks the authority to prevent other parties from pursuing claims.

At this time, the Department believes that the statute is largely self-executing and can be implemented directly without rules to further explain and carry out the statutory intent. Therefore, the proposed rule covers A.R.S. § 49-285.01(H), which specifically directs the Department to adopt rules to implement the fees charged for preparation and execution of a prospective purchaser agreement. If experience shows that A.R.S. § 49-285.01 is not self-executing, the Department will adopt any additional rules necessary to implement the statute.

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B. Specific Section-by-Section Explanation of this Proposal:

A person who demonstrates compliance to the Department with A.R.S. § 49-285.01 and who pays the fees prescribed in this Article may enter into a prospective purchaser agreement with the Department. The Department intends to conduct a due diligence review in determining whether there is compliance with the statutory conditions listed in A.R.S. § 49-285.01.

A review fee must be paid before any prospective purchaser agreement is executed. The review fee consists of 3 components: an initial \$900 fee; an hourly fee, if certain conditions apply; and a fee to cover legal notice publication costs.

The Department is unable at this time to anticipate all costs related to the preparation and execution of a prospective purchaser agreement. For this reason, the Department proposes a fixed initial fee and will pass along the actual costs which vary according to specific agreement features.

The Department will charge an initial fee of \$900 for a prospective purchaser agreement requiring minimal review. The initial fee covers direct and indirect Departmental technical review time and direct and indirect Department administrative costs. A prospective purchaser agreement requiring minimal review is 1 which requires 30 hours or less of review time spent by the Department. The initial fee of \$900 is based upon our best estimate of anticipated Departmental review time.

The Department is passing on to the applicant those fees which are not predictable due to variations in specific agreements. Those variable fees are technical review time in excess of 30 hours, any legal review fees, and legal notice publication costs. The rule provides that prospective purchasers are to be informed in advance of any hourly fees including technical review time and legal review time. The Department will not incur billable fees on behalf of the purchaser without prior written approval.

The \$900 initial fee is based upon use of a "boiler plate", or agreement language which covers commonly encountered situations. If a prospective purchaser requests specific language, or if circumstances arise outside those contemplated in the "boiler plate" agreement, Attorney General legal review is necessary and additional fees will be charged.

The statute requires that the Department provide public notice of prospective purchaser agreements and an opportunity for public comment before the agreement is executed. The Department intends that this public notice be consistent with that provided under the Water Quality Assurance Revolving Fund ("WQARF") rules and take the form of a legal notice. The Department's reasoning is that people affected by WQARF notices are those likely to be affected by prospective purchaser agreements. Public input for these agreements is best obtained by placing the notice where people are accustomed to finding it, in the legal notices section of the newspaper. The Department interprets A.R.S. § 49-285.01(G) as requiring 1 notice in a newspaper of general circulation in the county where the property is located. The rule requires a single notice, in contrast to the potentially double notice required under WQARF rules found in R18-7-110(B). For this reason, legal notice cost under the rule is less expensive than under the WQARF rules. Fees for publication of legal notices vary according to specific rates set by individual county newspapers, and because of their variability are treated as a "pass through" cost to prospective purchasers. Please see question 6 which contains the economic, small business and consumer impacts for information regarding specific newspaper rates.

The Department anticipates that cost estimates for technical review time in excess of those included in the initial 30 hours and for any legal review fees incurred by the Attorney General would take a form similar to current Water Quality Assurance Revolving Fund and voluntary reimbursement agreements, or cost estimates signed by the Department and the interested party.

The initial fee is due when the prospective purchaser agreement is submitted for review. The publication cost and any hourly fees are due within 30 days of billing. The review fee is payable to the state of Arizona, and shall be paid in full before a prospective purchaser agreement is executed.

5. A showing of good cause why the rule is necessary to promote a state interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable.

6. The preliminary summary of the economic, small business and consumer impacts:
EXECUTIVE SUMMARY

The Prospective Purchaser Agreement ("PPA") is a purely voluntary instrument entered into by the applicant and ADEQ to facilitate the purchase of a WQARF site (or a portion of a WQARF site) by a party who is not responsible or liable for the contamination on the site. The agreement might be sought by the prospective purchaser of property who wants to bring the site into full productive use, or to gain title to the property without potentially being held liable for clean-up costs. If the Department approves the agreement, the applicant obtains an assurance that he or she (or the company) will not be liable for clean-up of the existing contamination on the site.

A.R.S. § 49-285.01 directs the Department to charge reasonable fees for preparation and execution of the PPA. Apart from the PPA's voluntary nature, the fees to be paid by the applicant are essentially to enable ADEQ to recover its costs. The initial fee for the agreement is set by the Department at \$900. This sum is for ADEQ technical review and administration of the PPA. In addition to the initial fee, there are costs associated with the publication of a legal public notice which is required by the rule, and contingency costs for the use of Attorney General staff time, in the event the latter is required. Because the PPA is voluntary, the Department assumes that the value (the economic benefits) of the agreement to the applicant outweighs its costs.

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Clean-up of contamination on WQARF sites typically require extremely large financial resources; estimates in some cases have been in the tens of millions of dollars. The fees to be paid by the applicant are therefore minimal, when viewed in the context of a property owner's assurance of freedom from WQARF liability for clean-up costs. In addition, a substantial benefit could accrue to the general public if the Department facilitates a site's return to full productive use, when it might otherwise have to remain vacant or fall into disuse.

Since the PPA is strictly voluntary and fees are of a cost recovery nature, the Department regards this arrangement as more fair and equitable than one in which all taxpayers are compelled to shoulder the costs of a service that benefits only a particular group. ADEQ therefore believes that the benefits of this rule outweigh the costs.

Persons directly affected by the rule

1. Prospective Purchasers of WQARF Priority List and other Sites -- These are all individuals, private businesses, municipalities, and other political subdivisions of the state who desire to enter into a prospective purchaser's agreement with ADEQ.
2. State Agencies that are involved in the preparation of the PPAs -- ADEQ, as the implementing Agency, will make available its staff to administer and conduct a technical review of the agreement. Staff from the Attorney General's Office may also be required to review the agreement in cases that are complex, that may present legal problems, or that are outside the "boiler plate" agreement.
3. Responsible Parties as defined under A.R.S. § 49-283 -- These are entities who are responsible for the existing contamination of a site and are conducting or planning to conduct remediation or clean-up of the site. They will be informed of the agreement entered into by ADEQ and the prospective purchaser.
4. Newspapers of general circulation in the County where the Property is Located -- The publication of required legal public notices will generate revenue for these newspapers.
5. The general public could receive a substantial benefit from the facilitation of a process whereby a contaminated WQARF site is brought back to full economic use.
6. By making the PPA applicants pay fees, the taxpaying public will see its burden of providing services for specific groups diminished.

Cost-benefit analysis

1. Costs to ADEQ, the implementing agency. The costs to ADEQ for implementing the rule will be the costs of staff time required to administer and provide a technical review of the agreement. The Remedial Projects Section staff of the ADEQ Waste Programs Division has determined that it will take approximately 30 hours of staff time to put together a simple, i.e., "boiler plate" PPA. The staff hours are broken down according to the following:

STAFF	HOURLY RATES	HOURS	TOTAL COST
Section Manager	\$38.92	2	\$77.84
Unit Manager	\$35.72	4	\$142.88
Hydrologist III	\$30.97	8	\$247.76
Project Manager	\$29.57	8	\$236.56
Legal Asst. III	\$25.24	6	\$151.44
Program & Project Specialist II			
(Legal noticing)	\$24.18	2	\$48.36
TOTAL		30	\$904.84

The initial fee, which is rounded out to \$900, represents the costs of 30 hours of staff time utilized which is anticipated to be adequate for processing a simple agreement. The hourly rates are based on the position number's hourly salary rate, plus the costs of WQARF ERE (employee related expenses) and indirect (mainly overhead) costs incurred by the Department. Data were supplied by the ADEQ Budget Section.

In the event more than 30 hours are required, ADEQ will charge an hourly rate of \$30 for every hour of staff time utilized above the estimated 30 hours. The hourly rate represents the weighted average (\$30.16) of the total cost, rounded to the nearest dollar.

There are no incremental costs to ADEQ as a result of this rule, since the fees are intended to reimburse ADEQ's costs.

Benefits to ADEQ. There are no incremental benefits to ADEQ as a result of this rule. Fees to be paid by the applicant are merely to reimburse ADEQ for its costs; no profit margins are contemplated.

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2. Costs to the Attorney General's Office (AGO). If the PPA requires a review by the Attorney General's staff, the applicant will pay the fees based on the relevant staff member's hourly salary rate, plus ERE and indirect costs. This will be calculated on the prevailing contractual agreement between ADEQ and AGO for services rendered by the latter.

The current rate for an Assistant Attorney General assigned to WQARF cases is \$42.50 per hour; for a supervisor, it is \$50.80 per hour. This is a contingency cost which may or may not be incurred by the applicant. Again, these fees are merely to reimburse ADEQ for its costs.

Benefits to the AGO. Like ADEQ, there are no incremental benefits to the AGO.

3. Costs to political subdivisions. If a municipality or any political subdivision of the state makes an application for a PPA, ADEQ will process the application like any other. The applicant entity will then have to pay all applicable fees.

Benefits to political subdivisions. Benefits to a municipality or any other entity that applies for a PPA will depend on the reasons for the application. If the PPA is pursued to enable the development of a site by a government entity to address an important public purpose, obviously, there are benefits involved. An important public purpose is achieved if remediation is enhanced or accelerated, or the intended land use for a site is the creation of conservation or recreation areas. City parks or public golf courses, for example, are among amenities that a municipality may provide for the benefit of all its residents and the general public. However, these benefits cannot be quantified without research into the valuation of such amenities to residents who use them.

4. Costs to applicant private businesses. Private businesses that want to apply for a PPA would do so if it is apparent to them that the benefits to be derived from a PPA will be much greater than its potential costs. The only certain costs of a PPA are the initial fee and whatever legal notice costs are incurred, which are dependent on the specific newspaper involved. Contingency costs are AGO staff costs and additional ADEQ hourly costs, if relevant.

Benefits to applicant private businesses. Some of the benefits an applicant business owner could derive would be inherent in the location of the site. Site location, desirability of the site for the intended land use, availability for development, proximity to markets, appraisal values of competing sites -- these are all factors that could significantly affect the business owner's bottom line. The market value of the property alone, and prevailing market conditions, could impel a prospective purchaser to seek a PPA because there is the potential for profits -- something every business owner aims for.

5. Costs to newspapers. Newspapers are mainly operated as private businesses. They will be impacted by this rule to the extent that publication of a legal public notice is required by statute in a newspaper of county wide circulation where the site is located. There are no costs to newspapers required by this rule.

Benefits to newspapers. Newspapers will derive the benefits from revenues resulting from the publication of the legal notices. Revenues will depend on which newspaper publishes the legal notice and how many lines or column inches of copy are involved.

In Maricopa County, the *Arizona Republic* is considered to be the newspaper with the widest circulation. The *Republic* charges \$7.50 per line per day for local legal public notices of between 2 to 7 days. There is a required minimum of 3 lines and a maximum of 25 characters per line. If the publication days fall on a Saturday or Sunday, the charge is \$7.65 per line per day. On the assumption that the legal notice is published during a week day, and that 100 lines are used, the cost to the applicant is \$750.

In other counties, a legal notice of 10 column inches can range from \$52 to \$232. The *Arizona Daily Sun* in Coconino County charges \$5.20 per column inch (\$52 for 10 column inches) while the *Yuma Daily Sun* in Yuma County charges \$7.40 per column inch (\$74 for 10 column inches). The *Arizona Daily Star* in Pima County charges \$23.24 per column inch, again assuming the legal notice is 10 inches, the cost would be \$232.40.

Impacts on public and private employment

There are no impacts on public or private employment anticipated by this rule, i.e., the rule by itself will not create new jobs or destroy existing ones. Existing ADEQ and AGO staff will be able to handle processing of the PPAs. But, if the PPA facilitates the return to productive use of sites which are now vacant or would otherwise remain undeveloped, private businesses could be set up on these sites, and employment opportunities would be generated for the Arizona labor force. This would be a beneficial consequence of this rule.

Costs and benefits to private persons

A municipality or other political subdivision that applies for a PPA could possibly pass on the costs of fees to its residents ultimately. It is also possible that these costs could be readily absorbed by its existing budget. Either way, local taxpayers will pay. On the other hand, the fees are minimal when considered in relation to the "substantial public benefit" that could result.

7. The name and address of agency personnel with whom persons may communicate regarding the accuracy of the economic, small business and consumer impact statement:

Name: Mila Hill
Address: Department of Environmental Quality
3033 North Central Avenue, Eighth Floor
Phoenix, Arizona 85012-2809

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Telephone: (602) 207-4435 or (800) 234-5677, ext. 4435 (Arizona only)

Fax: (602) 207-2251

8. The time, place and nature of the proceedings for the adoption, amendment or repeal of the rule, or, if no proceeding is scheduled, where, when and how persons may request an oral proceeding on the proposed rule:

Persons interested in submitting written comments on the proposed rules should mail or fax them to Kathryn A. Cross, identified above no later than 5 p.m. on September 27, 1996.

The Department will hold an oral proceeding to receive public comments in accordance with A.R.S. § 41-1023. The time, place, and location of the hearing is listed below:

Date: September 23, 1996

Time: 1 p.m.

Location: ADEQ Public Meeting Room
3033 North Central Avenue
Phoenix, Arizona

The ADEQ is committed to complying with the Americans with Disabilities Act. If any individual with a disability needs any type of accommodation, please call (602) 207-4795 for special accommodations pursuant to the Americans with Disabilities Act. Persons interested in presenting verbal comments, submitting written comments, or obtaining more information on the proposed rules may do so at these meetings. The ADEQ will respond to all issues in the preamble accompanying the final rules.

9. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:
Not applicable.

10. Incorporation by reference and their location in the rules:
None

11. The full text of the rules follows:

TITLE 18. ENVIRONMENTAL QUALITY

**CHAPTER 7. DEPARTMENT OF ENVIRONMENTAL QUALITY
REMEDIAL ACTION**

ARTICLE 3. PROSPECTIVE PURCHASER AGREEMENT

R18-7-301. Prospective Purchaser Agreement Fees

ARTICLE 3. PROSPECTIVE PURCHASER AGREEMENT

R18-7-301. Prospective Purchaser Agreement Fees

- A.** A person who demonstrates compliance to the Department with A.R.S. § 49-285.01 and who pays the fees prescribed in this Article may enter into a prospective purchaser agreement with the Department.
- B.** A person shall remit a review fee for each prospective purchaser agreement submitted for review. The review fee shall consist of all of the following:
- 1.** An initial fee as prescribed in subsection (C);
 - 2.** An hourly fee, if the conditions of subsection (D) apply;
 - 3.** The publication costs for the legal notice as prescribed in subsection (F).
- C.** The Department shall charge an initial fee of \$900 for a prospective purchaser agreement requiring minimal review. The initial fee covers direct and indirect Departmental technical review time and direct and indirect Department administrative costs. A prospective purchaser agreement requiring minimal review is 1 which requires 30 or fewer hours of review time spent by the Department.

- D.** In addition to the initial fee described above, the Department shall charge an hourly fee for its review of a prospective purchaser agreement which requires more than 30 hours of Departmental review and shall charge an hourly legal review fee for any prospective purchaser agreement which requires legal review by the Attorney General. The Department shall notify the applicant of any estimated hours necessary to conduct its review over the initial review, and whether any legal review is required. The Department shall receive written authorization from the applicant before expending any billable hours.
- E.** The Department shall publish a legal notice announcing an opportunity for public comment on the prospective purchaser agreement. The legal notice shall include a general description of the contents of the agreement; the location where information regarding the agreement can be obtained; the name and address of the Departmental contact where comments may be sent; and the time and date that the comment period closes.
- F.** The initial fee is due when the prospective purchaser agreement is submitted for review. The publication cost and any hourly fees are due within 30 days of billing. Review fees are payable to the state of Arizona, and shall be paid in full before a prospective purchaser agreement is executed.